Filed 12/10/08 In re D.P. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re D.P., et al. Persons Coming Under the Juvenile Court Law.	B208008 (Los Angeles County Super. Ct. No. CK68677)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. THERESA P. et al. Defendants and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County. Marilyn Martinez, Commissioner. Affirmed.

Kate M. Chandler, under appointment by the Court of Appeal, for Defendant and Appellant Theresa P.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant Joseph M.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Kirstin J. Andreasen, Senior Associate County Counsel, for Plaintiff and Respondent.

Mother Theresa P. and father Joseph M. appeal the termination of their parental rights with respect to D.P. and C.M. (Welf. & Inst. Code,[1] § 366.26) on the ground that the notice provisions of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq. (ICWA)) were not fully followed. We agree that some provisions of ICWA were not followed properly, but find the errors to be harmless and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Minors D.P. and C.M. were the subjects of a dependency petition filed by the Department of Children and Family Services (DCFS) in 2007.

In documents filed with the juvenile court in June 2007, presumed father Joseph M. disclaimed any Native American ancestry, while Theresa P. wrote that she may have Apache ancestry. Accordingly, at the detention hearing on June 6, 2007, the juvenile court stated, "There is no reason to believe that ICWA applies on the father's side of the family. As to mother, there may be Apache affiliation. I'm ordering the Department to notice the Bureau of Indian Affairs and all Apache tribes." The children were ordered detained.

DCFS records indicate that on July 2, 2007, DCFS provided notice of the dependency proceedings and the upcoming jurisdiction/disposition hearing on July 13, 2007 to the Apache Tribe of Oklahoma, the Bureau of Indian Affairs, the Fort Sill Apache Tribe of Oklahoma, the Jicarilla Apache Nation, the Mescalero Apache Tribe, the San Carlos Tribal Council, the Tonto Apache Tribal Council, the White Mountain Apache Tribe, the Yavapai-Apache Nation, and the Secretary of the Interior. The JV-135 form listed each of the above recipients, and certified mail receipts were attached to demonstrate mailing to each one. The return receipts for the notices to the Bureau of Indian Affairs, the Yavapai-Apache Nation, the Tonto Apache Tribal Council, and the

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[1] Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

San Carlos Tribal Council were received before the July 13 hearing and were submitted to the juvenile court. At the July 13 hearing, the court said, "I cannot confirm that notice has been given as to ICWA. I have a number of return receipts. I don' t think I have them for every notification. We do need the time lines to run properly." The court conducted a pretrial resolution conference and appointed an expert to examine one of the children.

In preparation for the next court date, August 27, 2007, DCFS submitted the remaining return receipts from the July ICWA notices. DCFS also submitted response letters from the White Mountain Apache Tribe, the Tonto Apache Tribe, the Yavapai-Apache Nation, and the Mescalero Apache Tribe,[2] all of which asserted that D.P. and C.M. were neither enrolled nor eligible for membership in those tribes. The Bureau of Indian Affairs had also responded to acknowledge receiving notice from DCFS but asserting that no action was necessary on its part. On August 27, 2007, a referee of the juvenile court found that ICWA did not apply.

The children subsequently were declared dependents of the juvenile court under section 300, subdivision (b). The parents failed to comply with their case plans, and the juvenile court terminated reunification services. In May 2008 the juvenile court found by clear and convincing evidence that the children were adoptable; concluded that no exceptions to section 366.26 applied; terminated Theresa P. and Joseph M.'s parental rights; and freed the children for adoption. Theresa P. and Joseph M. appealed.

After the notice of appeal, the juvenile court reappointed attorneys for the parents for the purpose of reviewing compliance with ICWA and set a progress hearing for August 26, 2008 to address ICWA issues. In preparation for that hearing, DCFS contacted by facsimile the two tribes that had not responded in writing to the ICWA

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[2] The notice from the Mescalero Apache Tribe pertained only to C.M., not D.P. However, the tribe's letter explained that C.M. was not eligible for membership because her parents were not members of the tribe. As D.P. and C.M. have the same parents, as a practical matter the denial, although erroneously limited to the first child listed in the notice, can be applied to both children.

notice (the Apache Tribe of Oklahoma and the Jicarilla Apache Nation) and one tribe that had responded only as to C.M. (the San Carlos Apache Tribe). Each contacted tribe responded that the children were not eligible for enrollment with the tribe. DCFS also submitted a 2007 response from the Fort Sill Apache Tribe of Oklahoma that previously had not been submitted to the court, in which that tribe stated that none of the family members listed in the ICWA notice could be linked to the tribe and that the children were not eligible for membership. The juvenile court found that there was no reason to believe that ICWA applied in the matter.[3]

DISCUSSION

Theresa P. and Joseph M. assert three errors in the ICWA notice process. First, they assert that the trial court should not, under section 224.2, subdivision (d), have conducted the hearing on July 12, 2007. Section 224.2, subdivision (d) provides that "[n]o proceeding shall be held until at least 10 days after receipt of notice by the parent, Indian custodian, the tribe, or the Bureau of Indian Affairs," with the exception of the detention hearing. With the notices sent by mail on July 2 for a July 12 hearing, it is obvious that the hearing was held less than 10 days after the tribes received their notices; the return receipts that are dated indicate receipt dates of July 5, 9, and 10. Section 224.2, subdivision (d) was not satisfied here.

Second, they argue that DCFS erred when it gave no further notice to the tribes, the BIA, and the Secretary of the Interior about hearing dates after the July 12, 2007 hearing. Section 224.2, subdivision (b) provides that "[n]otice shall be sent whenever it is known or there is reason to know that an Indian child is involved, and for every hearing thereafter, including, but not limited to, the hearing at which a final adoption order is to be granted, unless it is determined that the Indian Child Welfare Act . . . does not

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[3] We granted County Counsel's request for judicial notice of these documents.

apply . . . ." The record does not demonstrate that ICWA notices were sent for subsequent hearings until the court determined that ICWA did not apply.

Third, Theresa P. and Joseph M. complain that the juvenile court declared that ICWA did not apply at the hearing on August 30, 2007 without permitting 60 days to pass after the tribes received their notices. Section 224.3, subdivision (e)(3) states, "If proper and adequate notice has been provided pursuant to section 224.2, and neither a tribe nor the Bureau of Indian Affairs has provided a determinative response within 60 days after receiving that notice, the court may determine that the Indian Child Welfare Act . . . does not apply to the proceedings." The record bears out this contention as well.

The parents argue for a reversal of the section 366.26 orders so that new ICWA notices may be issued and the proper timeframes observed. Under these particular circumstances, however, a remand for the issue of additional ICWA notices and the reinstitution of prior orders after a waiting period would be a pointless exercise because every tribe in question has replied that the children are not members and are ineligible for membership. While we do not condone the lack of ICWA compliance here, we conclude that the juvenile court's failure to secure compliance with ICWA's notice provisions and timelines is harmless under any standard. (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1162 [errors in ICWA notice procedure are harmless when even if the correct procedure had been followed, the child would not have been determined to be an Indian child].)

Because all the tribes have responded that they do not claim these children as members of the tribes, a conditional reversal such as the parents here urge would serve no purpose here other than delay. All that would happen if we were to remand the matter is that the permanent plan for the children would be held up while DCFS mailed another round of notices and sought another round of written responses from tribes that have already disclaimed any interest in the proceedings. Holding hostage the children's permanent plan while the court again makes the foregone conclusion that they are not subject to ICWA would exalt form over substance. (See *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1411-1414 [ICWA notice errors harmless where evidence showed that no Indian heritage could be traced for dependent child, so ICWA would not apply]; *In re*

Christopher I. (2003) 106 Cal.App.4th 533, 567 ["There is no reason to believe that Christopher is an Indian child, nor is there any reason to believe more notices over more time will result in any more information"].)

Theresa P. argues that the tribes' responses to the 2008 follow-up by the DCFS cannot be considered sufficient to demonstrate that the children lacked tribal membership because the faxed notices from the DCFS were inadequate notices under ICWA. She is correct that the DCFS faxes would not be sufficient alone to fulfill ICWA's notice requirements, but this is not the entirety of DCFS's communication with the tribes. Each of the tribes DCFS followed up with by fax in 2008 had received full ICWA notices in 2007[4] and did not seek to intervene in the proceedings.

Theresa P. asserts that the Apache Tribe of Oklahoma, the Jicarilla Apache Nation, and the San Carlos Apache Tribe never signed return receipts for the ICWA notices sent in 2007 and that there was therefore no evidence that they had in fact received the 2007 ICWA notices, so they therefore must be considered to have been relying only on the limited information in the DCFS follow-up faxes. The record, however, includes signed return receipts for the 2007 ICWA notices from these three tribes, demonstrating that the tribes had in fact received the notices in 2007. Moreover, the San Carlos tribe had responded in 2007 to the ICWA notice, but its response was erroneously limited to C.M. and did not include D.P.; DCFS requested a complete response covering both children via fax.

Father similarly contends that the tribes were responding only to the faxes, which did not include all of the information on the original ICWA notices. We observe that the follow-up faxes all referred to the original ICWA notices that had been sent. Moreover, as we have noted above, the record demonstrates that the tribes that DCFS contacted in 2008 had all received ICWA notices listing information about the potential Indian

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[4] The parents do not contend that the 2007 ICWA notices were inadequate to permit the tribes to determine whether the children were members of the tribes.

ancestor that enabled them to search their records with reference to the children here—and none of the tribes had chosen to intervene in the dependency proceedings.

While we express our longstanding concern at the failure to fully comply with the requirements of ICWA and our state implementing legislation, we conclude that the errors made here were harmless under any standard because all tribes received the ICWA notices, no tribe chose to intervene in the proceedings, and all tribes ultimately responded that the children were neither members of nor eligible for membership in the tribes. (*In re Antoinette S.*, *supra*, 104 Cal.App.4th at pp. 1413-1414.)

DISPOSITION

The judgment is affirmed.

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ZELON, J.

We concur:

WOODS, J., Acting P. J.

JACKSON, J.